

The Administrative Law Judge (ALJ) awarded claimant compensation for a 20.5 percent permanent partial disability to her left shoulder based upon an average of Drs. Eyster and Bieri's ratings. The ALJ also determined that claimant was entitled to additional temporary total disability compensation and payment of all the medical expenses incurred as a result of her April 28, 2005 accidental injury, including medical treatment claimant received on June 16, 2005, and thereafter. Claimant was awarded future medical

treatment upon proper application but the ALJ declined to issue an order that respondent hold claimant harmless from any Medicare lien that might be imposed in the future.

Claimant requests review of whether the ALJ erred in not ordering respondent to pay for claimant's medical treatment which included surgery, hospital care and related follow-up treatment that occurred after the June 16, 2005 surgery and whether the ALJ erred in not ordering respondent to pay any lien that may be exerted in the future by Medicare for claimant's surgery and treatment provided. Claimant further argues the ALJ should have issued an order that holds claimant harmless from the risk of being legally responsible for paying medical expenses related to claimant's shoulder surgery, hospital care, and follow-up care with Dr. Miller as well as physical therapy. Finally, claimant also argues the ALJ erred in not authorizing a physician to provide claimant ongoing medical treatment.

Respondent requests review of the following: (1) whether claimant is entitled to any additional temporary total disability benefits; (2) whether the evidence supports claimant's request for an award or order granting her medical expenses beyond those already paid by respondent; (3) whether the Board has jurisdiction to enter an order compelling respondent to pay benefits or money to a party other than claimant; and, (4) nature and extent of claimant's disability. Respondent argues claimant is not entitled to any additional temporary total disability compensation and her permanent partial disability should be reduced to 17 percent based upon Dr. Eyster's rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Marian Shufelberger has been employed over 20 years with respondent. Her job duties included coding and billing for Medicare. In November 2004 claimant had rotator cuff surgery on her left shoulder performed by Dr. Chris Miller. This was for a personal condition. Claimant was released to return to her regular duties without restrictions in February 2005. On April 9, 2005 she returned to Dr. Miller because she had noticed bruising in her left shoulder as well as a knot or nodule. She was told that the problem should resolve itself.

On April 28, 2005, claimant took some paperwork to a doctor's office and as she was leaving she tripped over a strap and lost her balance. Claimant fell and hit her left shoulder blade and the back of her head on a doorjamb. Claimant testified that her injury was between her elbow and shoulder joint which was completely different than her rotator cuff injury. She sought medical treatment and eventually was again treated by Dr. Miller. Dr. Miller performed surgery on claimant on June 16, 2005. Claimant then received

physical therapy. Her last visit with Dr. Miller was October 19, 2005. Dr. Miller also referred claimant for a second opinion with Dr. Dan Prohaska.

Respondent's insurance carrier had initially authorized treatment after the accident on April 28, 2005. But surgery was not authorized and all the medical treatment claimant received for her left upper extremity on June 16, 2005, and thereafter was submitted to Medicare for payment.

Dr. John J. Hart, board certified in family medicine, was not only claimant's employer but also her personal physician. He testified claimant was doing exceptionally well after her surgery in November 2004. The doctor further testified that after claimant was injured in the fall on April 28, 2005, she had more pain and difficulty sleeping at night. Dr. Hart opined claimant's fall on April 28, 2005, re-damaged the shoulder and exacerbated her underlying condition. Dr. Hart further testified that as a consequence of her injury, claimant would continue to need, into the foreseeable future, the sleep and pain medications he and Dr. Miller had prescribed.

Dr. Robert L. Eyster, board certified in orthopedic surgery, examined and evaluated the claimant on August 27, 2008, at the respondent's attorney's request. Claimant complained of loss of range of motion in her shoulder as well as pain. The doctor opined that at the time of the examination claimant was at maximum medical improvement. Based upon the *AMA Guides*¹, Dr. Eyster rated claimant's left upper extremity impairment at 17 percent due to loss of range of motion deficits in flexion and abduction. The doctor did not place any restrictions on claimant since she had returned to work for respondent. But he did opine that claimant would not be capable of doing work overhead with her left arm.

Dr. Peter V. Bieri, board certified in disability evaluation, examined and evaluated the claimant on February 4, 2008, due to claimant's attorney's request. The doctor reviewed medical reports and took claimant's history. Dr. Bieri rated claimant's range of motion deficits of the left shoulder at 19 percent plus 12 percent for weakness. These impairments combine for a 29 percent left upper extremity impairment. The doctor opined that claimant had a 3 percent preexisting impairment due to rotator cuff repair and range of motion deficit. He also determined that claimant had a 2 percent preexisting impairment due to weakness. The two preexisting impairments combine for a 5 percent left upper extremity impairment. Dr. Bieri opined that claimant had a 24 percent impairment to the left upper extremity which is directly attributable to the April 28, 2005 injury.

NATURE AND EXTENT OF DISABILITY

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The claimant suffered injury to her left upper extremity at the level of her shoulder. K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.² It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.³

Dr. Bieri rated claimant with a 24 percent rating to the left shoulder attributable to the April 28, 2005 accidental injury. Dr. Eyster rated claimant with a 17 percent rating to the left shoulder due to the April 28, 2005 accidental injury. In this instance the Board concludes neither rating is more credible and averages the opinions to find claimant has a 20.5 percent functional impairment to the left shoulder.

TEMPORARY TOTAL DISABILITY COMPENSATION

The claimant testified regarding the dates she was taken off work by specific doctors treating her for her work-related injury. And on cross-examination she agreed that some of the additional dates she had initially requested should not be included. The ALJ analyzed the evidence in pertinent part:

Respondent paid temporary total disability for the period of May 23, 2005 through June 12, 2005. Claimant contends that she was taken off work due to her work related injury on the following dates: April 29, 2005; May 18, 2005 through June 12, 2005; June 16, 2005 through June 27, 2005. The evidence supports claimant's contentions and the court finds that claimant is entitled to temporary total disability for a total of 5.71 weeks at the rate of \$449.00 per week. Respondent has paid

² *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

³ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

\$1,347.00 in temporary total disability payments to claimant, leaving a balance of \$1,216.79.⁴

The Board agrees and affirms.

FUTURE MEDICAL

Claimant testified that as a result of the persistent pain in her left shoulder she continues to be prescribed medication for her pain and medication to help her sleep. Dr. Hart testified that claimant would continue to need those medications into the foreseeable future as a consequence of her shoulder injury. Dr. Hart agreed that claimant had been prescribed similar medication after her rotator cuff surgery in 2004 but he felt she would completely recover from that surgery. But after the fall in April 2005, Dr. Hart concluded claimant would likely need pain medication for life. That testimony was not contradicted. The claimant has met her burden of proof to establish that she continues to require medication for her pain and to assist with her sleep. Consequently, the Board orders respondent to provide claimant with ongoing medical services with a physician to prescribe and monitor claimant's medications.

MEDICAL EXPENSES

The Workers Compensation Act requires the employer to provide such medical services that may be reasonably necessary to cure and relieve an injured employee from the effects of an injury. The Act provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁵

But if the employer refuses or neglects to provide medical treatment, the employee may obtain medical treatment and the employer is liable for that expense. The Act reads:

⁴ ALJ Award (Oct. 31, 2008) at 5.

⁵ K.S.A. 2005 Supp. 44-510h(a).

. . . If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director. . . .⁶

The ALJ determined that claimant was entitled to payment of all her medical expenses incurred because of the injury on April 28, 2005. The ALJ further specifically noted that the medical treatment claimant received on June 16, 2005, and thereafter was causally related to the April 28, 2005 fall at work. Finally, the ALJ ruled that the respondent was responsible for payment of all the claimant's medical expenses causally related to the injury. The Board agrees.

The evidence established that claimant suffered a work-related injury on April 28, 2005. Respondent initially provided treatment but when surgery was scheduled the respondent refused to provide any additional medical treatment. Claimant attempted to obtain approval for the treatment and also had her doctor contact the respondent's insurance carrier but surgery was not authorized. The claimant, unrepresented by counsel at that time, elected to proceed with the surgery and the bills for that surgery and follow-up care after the surgery were submitted to Medicare. Under these circumstances, claimant's medical treatment expenses should be ordered paid as authorized. Consequently, the respondent is ordered to reimburse Medicare for the expenses related to claimant's treatment for her work-related injury, subject to the fee schedule.

Claimant further requests that the Board enter an order that respondent hold claimant harmless in the event Medicare should impose a lien against claimant for the medical expenses it paid for her treatment for the work-related injury. But there is no actual controversy before the Board in that regard beyond the issue of whether the medical expenses incurred for treatment claimant received for her injury should be ordered paid as authorized medical expenses. As previously noted, the respondent is ordered to pay the claimant's medical treatment expenses for her work-related injury including the treatment she received for her injuries after June 16, 2005.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated October 31, 2008, is modified to order respondent to provide claimant with ongoing medical services with a physician to prescribe and monitor claimant's medications and affirmed in all other respects.

⁶ K.S.A. 2005 Supp. 44-510j(h).

IT IS SO ORDERED.

Dated this _____ day of July 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge